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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1962**

**U.S. Supreme Court, U.S.  
FILED**

**DEC 8 1962**

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**NO. ~~100~~ 34**

**BROTHERHOOD OF RAILROAD TRAINMEN,**

*Petitioner,*

**v.**

**COMMONWEALTH OF VIRGINIA, ex rel,**

*Virginia State Bar,*

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE  
SUPREME COURT OF APPEALS OF VIRGINIA**

**BRIEF FOR RESPONDENT IN OPPOSITION**

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**December 8, 1962**

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**In The  
SUPREME COURT OF THE UNITED STATES**

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**NO. 583**

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**v.**

**COMMONWEALTH OF VIRGINIA, ex rel.,**  
**Virginia State Bar,**  
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**ON PETITION FOR WRIT OF CERTIORARI  
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**BRIEF FOR RESPONDENT IN OPPOSITION**

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**THE PETITION STATES NO QUESTION FOR REVIEW**

The petition for writ of certiorari presents no question for this Court to decide.

Counsel for petitioner undertake to present two questions for review (P 7-8):

"(1) Whether the Brotherhood of Railroad Trainmen and its members have the *right to make known to its members generally*, and to injured members and their survivors in particular, first, *the advisability of obtaining legal advice* before making settlement of their claims, and second, *the names of attorneys, who, in its and their opinion, have the capacity to handle such claims successfully*, and whether this right is protected by the First and Fourteenth Amendments to the Constitution of the United States?

"(2) Whether the Federal Railway Act, which authorizes the Brotherhood to represent its members generally and specifically to handle their 'grievances', creates such an interest in the Brotherhood, that it has the *right to make known to its members the advisability of obtaining legal advice and to make known the names of competent counsel* in connection with rights of members under the Federal Employers' Liability Act, notwithstanding any rule or doctrine of State Law?" (Italics supplied)

The decree of the Chancery Court of the City of Richmond, entered January 29, 1962, restrains the Brotherhood and its members "from giving or furnishing legal advice to its members or their families; from holding out lawyers selected by it as the *only* approved lawyers to aid the members or their families; \* \* \* and from doing any act or combination of acts, and from formulating and putting into practice any plan, pattern or design, the *result* of which is to channel legal employment to any particular lawyer or group of lawyers; and, in general, from violating the laws governing the practice of law in the Commonwealth of Virginia." (R 150-155, PA 2-6. Italics supplied). The substance of the other prohibitions

of that decree are found in the opinion in *In Re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163, upon which petitioner has relied as establishing the yardstick by which its conduct should be governed.

The exercise of the claimed rights, whether secured by the First and Fourteenth Amendments to the Constitution of the United States or by the Federal Railway Act, are not enjoined by the decree of the Chancery Court of the City of Richmond.

The Supreme Court of Appeals of Virginia, denying the Brotherhood's petition for an appeal and supersedeas on June 12, 1962, stated:

" \* \* \* the court being of opinion that *the said decree is plainly right*, doth reject said petition, and refuse said appeal and supersedeas, *the effect of which is to affirm the decree of the said chancery court.*" (R 177, PA 6-7. Italics supplied).

Petition for rehearing was denied on August 31, 1962 (R 179, PA 1). Neither act of the Supreme Court of Appeals of Virginia enjoined the petitioner from exercising the rights claimed.

It is clear, beyond contradiction, that the rights claimed by the petitioner, the alleged denial of which are set out as the questions presented for review by this Court (P 7-8), are not enjoined or otherwise interfered with either by the decree of the Chancery Court of the City of Richmond or by the subsequent actions of the Supreme Court of Appeals of Virginia. There is no question for this Court to decide.



## STATEMENT OF FACTS

Petitioner's STATEMENT OF CASE falls far short of the "concise statement of the case containing the facts material to the consideration of the questions presented" required by Rule 23, par. 1 (e).

Though ignored by petitioner, the facts found by the Chancery Court in its decree (R 150-152, PA 3-4) are the established facts before this Court. Petitioner has not set forth any question regarding the propriety of those findings.

Petitioner, however, has set forth certain isolated portions of a voluminous record, which in the light of the whole are incomplete, inaccurate or altogether untrue (P 5-7) and should not go unchallenged. The Brotherhood not only admitted as it now concedes (P 5), "that prior to April 1, 1959, Legal Counsel handled cases for injured members and estates of deceased members on a contingent fee basis, and further that Legal Counsel made contributions to the Department of Legal Counsel" but its answer and other papers filed (R 11-14, 30-33, 42-49, 69-84) also admit that *all of the acts charged in the bill of complaint* had been committed in a majority of the several states and in Virginia up to April 1, 1959, and set out affirmatively therein that *none* of the acts complained of had been committed in *any* state, including Virginia, since April 1, 1959 (R 11-14, 30-33). The Virginia State Bar did not, therefore, offer its evidence to prove the unauthorized acts committed in Virginia prior to April 1, 1959. They were admitted.

Excepting plaintiff's Exhibits 80. (Tr 287) and 81 (Tr 288) and the inferences therefrom, respondent was unable to show that any of the acts complained of had been committed in Virginia since April 1, 1959. Therefore, the

respondent produced evidence that the Brotherhood was continuing to operate substantially as it had done before April 1, 1959, in other states where its activities were not under examination and in states where the proceedings enjoining or otherwise restraining such activities had ended by decree with or without its consent. The depositions of the witnesses in the several states, the testimony adduced in open court and the exhibits clearly show and the Chancellor found that the Brotherhood had not in fact ceased the acts complained of on a national plane as it protested but, on the contrary, that it "still adheres to the pattern and design of the plan formulated and implemented in 1930" (R 152, PA 4).

The Chancery Court found "that there is reasonable ground for apprehension that this plan and course of conduct will, in furtherance of the defendant Brotherhood's avowed purpose, be adopted and put into effect in the City of Richmond, within the jurisdiction of this court" (R 152, P 16, PA 4). The "clear and present danger" as well as the "clear public interest", the determinative factors laid down in *Thomas v. Collins*, 323 U. S. 516, 69 S.Ct. 315, 69 L.ed. 430, and much quoted by petitioner (P. 13-15), were present.

For convenience and in support of the foregoing, each finding of fact made by the Chancellor in his decree of January 29, 1962, is documented to the record at the points hereinafter designated showing beyond dispute that they are conclusively supported by properly admitted evidence.

1. "The defendant Brotherhood in 1930 adopted a plan designed to make available to its members, and the families of its deceased members, the professional services of attorneys selected by the Brotherhood to represent them in

claims for personal injury or death arising out of railroad service" (Plaintiff's Exhibits: No. 1, Tr 34; No. 1A, Tr 38; No. 1B, Tr 39; No. 2, Tr 40; No. 3, Tr 42; No. 4, Tr 44; No. 5, Tr 44; No. 6, Tr 50; No. 6A, Tr 50; No. 6B, Tr 53; No. 7, Tr 54; No. 8, Tr 57; No. 9, Tr 58; No. 10, Tr 58; No. 12, Tr 64; No. 12A, Tr 65; No. 13, Tr 66; No. 14, Tr 66; No. 15, Tr 67 and No. 16, Tr 68).

2. "In order to implement this plan the Brotherhood established at its Grand Lodge a 'Legal Aid Department' (renamed on January 1, 1959, 'Department of Legal Counsel'), divided the United States into Regions, and entered into agreements with certain attorneys at law selected by the Brotherhood in each Region, called Regional Counsel (on and after January 1, 1959, called Legal Counsel)." (Plaintiff's Exhibits: No. 3, Tr 42; No. 4, Tr 44; No. 5, Tr 44; No. 10, Tr 58; No. 12, Tr 64; No. 12A, Tr 65; No. 13, Tr 66; No. 14, Tr 66; No. 15, Tr 67; No. 16, Tr 68; No. 33, Tr 188; No. 34, Tr 188; No. 35, Tr 189; No. 37, Tr 190; No. 70, Tr 280 and No. 71, Tr 280; Defendant's Answer, par. 5, R 11).

3. "The defendant Brotherhood assigned one or more 'Regional Investigators' to each such counsel, who were paid by the Brotherhood." (Plaintiff's Exhibits: No. 4, Tr 44; No. 11, Tr 60 and No. 17, Tr 77; Chase Exhibits C through J, Tr 387-398).

4. "The operation of this plan has from its inception resulted, and still results, in channeling all, or substantially all, claims for personal injury to, or death of, members into the hands of such Regional (or Legal) Counsel." (Plaintiff's Exhibits: No. 17, Tr 77; No. 21, Tr 110; No. 67, Tr 278; No. 79, Tr 287; No. 80, Tr 287 and No. 81,



Tr 288; Nelson Exhibits A through M, Tr 144-173; Kennedy Deposition, p. 109).

5. "In furtherance of the plan the defendant Brotherhood has advised, and continues to advise, its members and the families of deceased members with respect to the legal aspects of their claims;" (Plaintiff's Exhibits: No. 17, Tr 77 and No. 78, Tr 286; Kennedy Deposition, p. 43).

6. "has held out, and continues to hold out, Regional (or Legal) Counsel as the only lawyers approved by the Brotherhood to aid its members and their families;" (Plaintiff's Exhibits: No. 17, Tr 77; No. 72, Tr 281; No. 73, Tr 281; No. 73A, Tr 282; No. 73B, Tr 282; No. 74, Tr 282 and Nos. 74A-74C, Tr 283; Kennedy Deposition, pp. 43, 44; Depositions of McLaughlin, Olsen, Hodges, Clark, Gibson, Loman, Troxtell and Garwood).

7. "has controlled, and continues to control, directly or indirectly, the fees to be charged by such counsel to its members and their families;" (Plaintiff's Exhibits: No. 4, Tr 44; No. 5, Tr 44; No. 12, Tr 64; No. 12A, Tr 65; No. 13, Tr 66; No. 14, Tr 66; No. 15, Tr 67; No. 16, Tr 68; No. 17, Tr 77; No. 18, Tr 104; No. 21, Tr 110; No. 35, Tr 189 and No. 78, Tr 286; Kennedy Deposition, pp. 115-116).

8. "has furnished to such counsel prompt notice of the injury or death of a member in railroad service for the purpose of aiding such counsel in obtaining legal employment by its members and their families;" (Plaintiff's Exhibits: No. 17, Tr 77 and No. 78, Tr 286; Nelson Exhibits K, Tr 172, and L, Tr 173; Defendant's Answer, par. 6, R 12).

9. "has solicited, and continues to solicit, the handling of such claims by such counsel;" (Plaintiff's Exhibits: No. 17, Tr 77 and No. 78, Tr 286; Nelson Exhibits K, Tr 172; and L, Tr 173; Defendant's Answer, par. 6, R 12; Kennedy Deposition, pp. 43 and 44; Depositions of McLaughlin, Olsen, Hodges, Clark, Gibson, Loman, Troxtell and Garwood).

10. "has paid the salaries of the Regional Investigators (whose chief function is to solicit legal employment of such counsel to prosecute such claims);" (Nelson Exhibits K, pp. 79-80, Tr 172 and L, Tr 173; Chase Exhibits C through J, Tr 387-398).

11. "has advised, and continues to advise, members and the families of deceased members that the Regional (or, Legal) Counsel will defray expenses and make advances during the pendency of claims;" (Plaintiff's Exhibits: No. 17, Tr 77 and Nos. 38-66D, Tr 193-201; Kennedy Deposition, pp. 94-96).

12. "has accepted, both directly and indirectly, a share of the counsel's fees;" (Plaintiff's Exhibits: No. 4, Tr 44; No. 5, Tr 44; No. 12, Tr 64; No. 12A, Tr 65; No. 13, Tr 66; No. 14, Tr 66; No. 15, Tr 67; No. 16, Tr 68; No. 17, Tr 77; No. 18, Tr 104; No. 19, Tr 109; No. 20, Tr 110; No. 21, Tr 110; No. 22, Tr 112; No. 23, Tr 113; No. 25, Tr 122; No. 26, Tr 123; No. 27, Tr 125; No. 28, Tr 125; No. 28A, Tr 125; No. 28B, Tr 126; No. 29, Tr 128; No. 30, Tr 129; No. 31, Tr 133 and No. 35, Tr 189; Nelson Exhibit A, Tr 144; Chase Exhibits G through J, Tr 391-398; Kennedy Deposition, pp. 8-13).

13. "and has countenanced the sharing of the fees of such counsel by the Regional Investigators and others who

procure legal employment for such counsel." (Nelson Exhibits J through K, Tr 171-172).

14. "Various courts throughout the several states in which the practices of the defendant Brotherhood have been subjected to inquiry have reached similar findings of facts and have enjoined the continuance of such practices by the defendant Brotherhood and its Regional (Legal) Counsel." (Plaintiff's Exhibits: Nos. 17-31, Tr 77-133).

15. "The defendant Brotherhood has made protestations on occasions prior to April 1, 1959, that it would discontinue the objectional aspects of the plan and has from time to time made protestations that it has done so; yet it is admitted in the Brotherhood's answer that these practices continued up to April 1, 1959." (Plaintiff's Exhibits: Nos. 17-31, Tr 77-133; No. 75, Tr 284 and No. 76, Tr 285; Defendant's Answer, R. 11-14, and More Particulars Furnished, R. 30-33).

16. "The court finds that the defendant Brotherhood still adheres to the pattern and design of the plan formulated and implemented in 1930." (Chase Exhibits H through J, R. 391-398; Kennedy Deposition; Depositions of McLaughlin, Olsen, Hodges, Clark, Gibson, Loman, Troxtell and Garwood).

#### **BROTHERHOOD'S POSITION UNTENABLE**

Petitioner contends that the decision of the Supreme Court of Appeals of Virginia in *NAACP v. Harrison*, 202 Va. 142, 116 S.E. 2d 55, now before this Court, conflicts with the holding in the instant case (P. 16-17). A mere comparison of the two cases discloses the obvious fallacy of that contention. Respondent did not rest its case

on the Virginia statutes defining and regulating the practice of law. Nor does that decision prohibit or restrict the exercise of the alleged rights claimed in this petition.

Petitioner must consider this Court naive indeed to accept petitioner's statements of "The sole objective of the Brotherhood of Railroad Trainmen, its officers, agents, servants, employees, and its members" (P 12, 17, 18-19) in the light of the record and the Chancery Court's findings of fact (R 150-152, PA 2-4). Petitioner disingenuously insinuates that its 5% share in the gross settlements made by its sixteen selected attorneys, paid out of the contingent fees charged by them as fixed by petitioner, constituted no part of its motivation in formulating and implementing its plan for Legal Aid. Reference to Nelson Exhibit A (Tr 144), Chase Exhibit F (Tr 390), and Kennedy Exhibit K-4 (Kennedy dep., p. 100) alone suffice to establish the enormous financial interest of both the Brotherhood and its selected attorneys in channeling the claims of its members to those attorneys. Nelson Exhibits I and J (Tr 169, 171) reveal also the financial interest of the individual members who "run" the cases of their fellow members to the selected attorneys.

Petitioner, in elaboration of the second question which it undertakes to present (P 18-26), seems to suggest that the Federal Railway Act, when it authorized the Brotherhood to handle its members' "grievances", thereby granted to the Brotherhood the right to represent its members in FELA actions, i.e. the right to practice law in the several states unhampered by "any rule or doctrine of State Laws" (P 8, 18). That such was the intent of the Congress when the Federal Railway Act was adopted or that such is now its effect is incredulous and not worthy of serious comment.



**CONCLUSION**

Respondent submits that the petition for the writ of certiorari to the Supreme Court of Appeals of Virginia should be denied.

Respectfully submitted,

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December 8, 1962.